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In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE UNITED STATES, APPELLANT,

v.

THE DETROIT TIMBER AND LUMBER COMPANY ET AL., appellees.

No. 106.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

AND

THE MARTIN-ALEXANDER LUMBER COMPANY, JOHN H. Scott, Thomas J. Clements, Jim P. Copeland, John H. Wilson, Robertson C. Gregory, Martha Gregory, Joseph O. Means, Archibald G. Winslow, Caroline H. Means, Emma Winslow, James F. Patterson, Gus C. Copeland, George T. Colston, Henry Jones, Sherman Garrison, Barbara Garrison, and Bill D. Copeland, appellants,

v.

THE UNITED STATES.

No. 165, Cross Appeal.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE UNITED STATES, APPELLANT,
v.
THE DETROIT TIMBER AND LUMBER COMPANY, et al., appellees. } No. 106.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

AND

THE MARTIN-ALEXANDER LUMBER COMPANY, JOHN H. SCOTT, THOMAS J. CLEMENTS, JIM P. COPELAND, JOHN H. WILSON, ROBERTSON C. GREGORY, MARTHA GREGORY, JOSEPH O. MEANS, ARCHIBALD G. WINSLOW, CAROLINE H. MEANS, EMMA WINSLOW, JAMES F. PATTERSON, GUS C. COPELAND, GEORGE T. COLSTON, HENRY JONES, SHERMAN GARRISON, BARBARA GARRISON, AND BILL D. COPELAND, appellants,
v.
THE UNITED STATES. } No. 165, Cross appeal.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Under the act of June 3, 1878, and the act of August 4, 1892, amendatory thereof, any citizen of the United States, or any person who has declared his

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intention to become such, may purchase from the United States any quantity not to exceed 160 acres of land chiefly valuable for timber but unfit for cultivation, in the public land States, at the minimum price of $2.50 per acre. Any person desiring to avail himself of the provisions of these acts must file with the register of the proper land district an affidavit which, among other things, must declare that the applicant "does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit, and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself; * * *" The acts further provide that "if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of bona fide purchasers, shall be null and void."

Under these acts forty-four persons, who are made defendants to the bill, made entries upon lands in the State of Arkansas, each of whom made and filed the affidavit required by said acts of Congress, and patents were issued upon these entries between February 23, 1900, and May 9, 1901.

The United States, on April 5, 1902, commenced proceedings in equity in the Circuit Court for the

Western District of Arkansas to vacate the patents which were issued to said forty-four entrymen. The material allegations of the original and amended bills are as follows:

That on or about the 1st day of August, 1899, Elmer B. Martin, Arch V. Alexander, and J. P. Copeland conspired together to defraud the United States of the lands which were taken up by the forty-four entrymen, as above described, and to obtain the timber growing thereon for the Martin-Alexander Lumber Company, which was at that time operating a sawmill at or near Pike City, Ark., of which company Martin was president, Alexander was secretary, and Copeland an employee; that to effect such purpose these three parties induced and procured forty-four persons, among whom were Copeland and twenty-four other employees of the Martin-Alexander Company and ten women who were the wives of employees, fraudulently to make applications at the land office at Camden, Ark., to enter each a separate portion of land under the said acts of Congress; that each of said forty-four persons made an entry at said land office, the date of each entry and the description of the land entered being set out in the bill; that before said entries were made Martin, Alexander, and Copeland entered into an agreement with each and every of the said entrymen that each and every entry should be made by them for the use and benefit of the Martin-Alexander Company, and that upon the issuance of the receiver's receipt to each he or she should at once execute to the said Martin-Alexander Company a conveyance of all the timber

standing and growing upon the land entered by him or her, respectively; that prior to making of said entries it was agreed by Martin, Alexander, and Copeland and the said entrymen that the Martin-Alexander Company should pay all expenses appertaining to the purchase of said lands, including the purchase price thereof, and that, pursuant to such agreement, Martin, Alexander, and Copeland transported said entrymen, at various times between the 1st of August, 1899, and the 15th of September, 1900, from their homes at or near Pike City to Camden, Ark., to make said entries and proofs thereon, and that the railroad fares to and from Camden, hotel bills at Camden, all fees paid at the land office, cost of publication of entries by each entryman, and the purchase price of the lands were all paid by either Martin, Alexander, or Copeland. The United States further alleged that if there was no agreement between the entrymen and the Martin-Alexander Company that conveyances would be made to the company, each and every of said entrymen made his or her entry on speculation and not in good faith for the purpose of appropriating the same to his or her own use and benefit, which purpose was well known to the said company and that said company aided and assisted in obtaining the lands from the Government for the purpose of speculation; that after receiver's receipts had been issued to said entrymen they, with the exception of three of them, executed conveyances of the timber on their entries to the Martin-Alexander Company; that without knowledge of said frauds pat-

ents to the lands were issued by the United States between the dates above given; that on January 14, 1901, the Martin-Alexander Company sold and transferred to the defendant, The Detroit Timber and Lumber Company, all of said timber contracts and leases for the timber on the lands in suit and that before and at the time of such sale The Detroit Timber and Lumber Company had full and complete knowledge of all the fraudulent acts of Martin, Alexander, and Copeland, and of those who made the entries, the fraudulent agreements with the said entrymen, and full and complete knowledge that the affidavits filed by them were false and that the entries had been made for the use and benefit of the Martin-Alexander Company; that since the purchase of said timber contracts by The Detroit Timber and Lumber Company it has obtained deeds to twenty-seven of the tracts of land; that a large quantity of timber had been cut from said lands by The Detroit Timber and Lumber Company and that company was still cutting timber therefrom.

The bill prayed that all of said patents, as well as the contracts and leases from the original patentees, be declared null and void and canceled and that title to all of said lands be vested in the United States; that an account be taken of the timber cut and removed from said lands by the two companies and that the United States have judgment against each for the value of the timber cut by it; that an injunction issue restraining The Detroit Timber and Lumber Company and all persons claiming under its authority, direction,

or control from cutting any timber on said lands until the further order of the court.

On April 19, 1902, a temporary injunction was issued in accordance with the prayer of the bill (Rec., p. 15).

On June 3, 1902, the Martin-Alexander Lumber Company filed its answer in which it denies that Martin, Alexander, and Copeland entered into any agreement with the applicants for land conveyed to it, or the timber on the lands, or that any of the persons making the entries acted on behalf of it, and denies further that any contract or agreement whatever about said lands or the timber thereon was ever made between it, or any person or persons for it, and the entrymen until after the land had been purchased and paid for. The answer further states that the Martin-Alexander Company is informed and believes that the lands were applied for and purchased in good faith to appropriate only to the use of those who applied for them. The answer further denies that it was agreed by and between said Martin, Alexander, and Copeland and each of the entrymen prior to the making of said entries that the company should pay all expenses incident to the purchase of said lands, including the cost of same, or that Martin, Alexander, and Copeland transported the entrymen from their homes to the land office to make the entries, or that they paid their railroad fares, hotel bills, etc. The answer further denies that after said entries were made and after the purchase money and land office fees had all been paid and after receiver's receipts had been issued to the entrymen

that said entrymen executed timber contracts to the company conveying the timber growing on the lands, or that Martin, Alexander, and Copeland induced and procured the entrymen to make false and fraudulent affidavits before the land office. The answer admits that the Martin-Alexander Lumber Company sold its property to The Detroit Timber and Lumber Company, but denies that the Detroit Company had any notice of any fraudulent acts of Martin, Alexander, and Copeland as alleged in the bill and alleges that no such fraudulent acts had been committed by Martin, Alexander, and Copeland, and that none of said entries were made for the benefit of the Martin-Alexander Company. The answer further denies that it and the Detroit Company have cut and removed timber from the lands in controversy to the amount alleged in the bill ($60,000) and denies that the plaintiff has any right to ask for an accounting.

On May 19, 1902, The Detroit Timber and Lumber Company filed its separate answer, in which it sets up that in making its purchase from the Martin-Alexander Lumber Company and taking deeds from the entrymen it was an innocent purchaser.

Thirty-eight of the entrymen answered, but their answer is excluded from the record in the Circuit Court of Appeals and from the record in this court.

The land without the timber is of no value.

Upon final hearing the Circuit Court dismissed the bill, but the injunction was continued by said court pending an appeal to the Circuit Court of Appeals;

such appeal was perfected and the injunction was continued in force by the Circuit Court of Appeals until a final hearing of the appeal was therein had. The Circuit Court of Appeals (Rec., p. 443) decided that The Detroit Timber and Lumber Company was an innocent purchaser of the timber and of the legal title to twenty-seven tracts of land for which it had obtained deeds from entrymen and that as to the remaining seventeen tracts of land, the title to which still stands in the original applicants and patentees, The Detroit Timber and Lumber Company owns the timber thereon and has the right to remove it according to the terms of the timber contracts entered into between the entrymen and its vendor, the Martin-Alexander Company. The Circuit Court of Appeals, however, decided that while there was no evidence of any agreement by the entrymen by which the title which they might acquire should inure to the benefit of any person except themselves, they did, in fact, obtain the land *on speculation for the use and benefit of the Martin-Alexander Company and not in good faith to appropriate it to their own exclusive benefit.* As to the Detroit Company, therefore, the decree of the Circuit Court was affirmed, but as to the seventeen tracts of land, the title to which had not passed to the Detroit Company, the decree of the Circuit Court was reversed and the case was remanded to that court with instructions to enter a decree to the effect that said seventeen patents be voided with costs in favor of the United States against the entrymen and the Martin-Alexander Lumber Company. Upon the appeal to

this court the Circuit Court of Appeals, on the same day upon which the appeal was allowed, continued the injunction until the third Monday of October, 1904. On October 15, 1904, this court was asked to continue such injunction pending its decision and the final determination of the case, and on October 24, 1904, the motion was granted.

The United States appeals from the decree of the Circuit Court of Appeals in so far as it holds The Detroit Timber and Lumber Company an innocent purchaser.

ASSIGNMENT OF ERRORS.

1. The court erred in refusing to hold that prior to the entries made at the United States land office at Camden, Ark., by defendants, John H. Scott, Thomas J. Clements, Jim P. Copeland, John H. Wilson, Robbie J. Hughes, Robertson C. Gregory, Martha Gregory, Joseph O. Means, Archibald G. Winslow, Caroline H. Means, Emma Winslow, James F. Patterson, Emma E. Lintz, Bill D. Copeland, George T. Colston, Henry Jones, Henry M. Lintz, Rosa L. Anderson, William F. Anderson, Gus C. Copeland, Bedford F. Patterson, Emmett S. Keebaugh, Charles W. Fuller, Henry P. Hughes, Stephen A. Fuller, Alvin Pry, George W. Cooper, Ezekiel Y. Fuller, Willis Cooper, Thomas Roberts, Mittie C. Roberts, Lawrence C. Horne, William F. Waits, Sherman L. Garrison, Barbara A. Garrison, Seborn Z. Moran, Charles W. Davis, Bill Dorsey, Mary F. Davis, Emma J. Moran, Jim S. Pennington,

Jennie V. Pennington, Charles M. Mackey, and Carrie M. Hicks, an agreement was entered into by and between each and every of said entrymen and entrywomen and their codefendant, the Martin-Alexander Lumber Company, that the entry made by each of them, respectively, should be made for the benefit of the Martin-Alexander Lumber Company in order that it might obtain the timber growing on the lands covered by said entries.

2. The court erred in refusing to hold that the appellee, The Detroit Timber and Lumber Company, prior to its purchase of timber deeds and contracts from its codefendant, Martin-Alexander Lumber Company, had knowledge of the fact that the entries covered by said timber deeds or contracts were made at the United States land office under an agreement between said Martin-Alexander Lumber Company and each and every of the entrymen and entrywomen; that the entry made by each of them, respectively, should be made for the benefit of said Martin-Alexander Lumber Company in order that it might obtain the timber standing and growing on said entry.

3. The court erred in refusing to hold that The Detroit Timber and Lumber Company, prior to its purchase of timber deeds or contracts from its codefendant, Martin-Alexander Lumber Company, had knowledge of the fact that the entries of lands covered by said timber deeds or contracts were made at the United States land office at Camden, Ark., by each and every of the entrymen and entrywomen on speculation.

4. The court erred in refusing to hold that The Detroit Timber and Lumber Company was not an innocent purchaser of the lands and the contracts for timber from lands described in complainants' bill.

5. The court erred in holding that said Detroit Timber and Lumber Company is entitled to the timber from seventeen tracts entered by the following defendants: John H. Scott, Thomas J. Clements, Jim P. Copeland, John H. Wilson, Robertson C. Gregory, Martha Gregory, Joseph O. Means, Archibald G. Winslow, Caroline H. Means, Emma Winslow, James F. Patterson, Gus C. Copeland, George T. Colston, Henry Jones, Sherman Garrison, Barbara Garrison, and Bill D. Copeland.

6. The court erred in holding that appellant is entitled to no relief against The Detroit Timber and Lumber Company.

7. The court erred in directing that appellant's bill be dismissed as against The Detroit Timber and Lumber Company, Martin-Alexander Lumber Company, Robbie J. Hughes, Emma F. Lintz, Henry M. Lintz, Rosa L. Anderson, William F. Anderson, Bedford F. Patterson, Emmett S. Keebaugh, Charles W. Fuller, Henry P. Hughes, Stephen A. Fuller, Alvin Pry, George W. Cooper, Ezekiel Y. Fuller, Willis Cooper, Thomas Roberts, Mittie C. Roberts, Lawrence C. Horne, William F. Waits, Seborn Z. Moran, Charles W. Davis, Bill Dorsey, Mary F. Davis, Emma J. Moran, Jim S. Pennington, Jennie V. Pennington, Charles M. Mackey, Carrie M. Hicks, and D. D. Brunson.

There is a cross appeal by the Martin-Alexander Lumber Company and seventeen entrymen as to so much of the decree of the Circuit Court of Appeals as holds the seventeen patents void, with costs against the entrymen and the Martin-Alexander Lumber Company.

ASSIGNMENT OF ERRORS (CROSS APPEAL).

1. That the court erred in holding that John H. Scott, Thomas J. Clements, Jim P. Copeland, John H. Wilson, Robertson C. Gregory, Martha Gregory, Joseph O. Means, Archibald G. Winslow, Caroline H. Means, Emma Winslow, James F. Patterson, Gus C. Copeland, George T. Colston, Henry Jones, Sherman Garrison, Barbara Garrison, and Bill D. Copeland, or any of them, applied to enter the lands he or she obtained on speculation for the use and benefit of this appellee and not in good faith to appropriate it to his or her own exclusive benefit.

2. That the court erred in holding that any of the said entrymen made his or her entry on speculation, for the use and benefit of this appellee, and not in good faith to appropriate it to his or her own exclusive benefit.

3. That the court erred in reversing the decree of the Circuit Court.

4. That the court erred in rendering a decree for the costs against this appellee.

5. That the court erred in not rendering a decree affirming the decree of the Circuit Court.

Summarizing the foregoing review, it seems that, as the case now stands before this court, the United States recovers nothing by its bill except the legal title to seventeen tracts of land, without the timber thereon. It recovers nothing for the timber taken from the forty-four entries prior to filing its bill. The Detroit Company gets the legal title to twenty-seven of the tracts and the timber on all forty-four tracts, but is enjoined from taking the timber until the final determination of the suit. The seventeen entrymen who have not parted with their legal titles are deprived thereof and costs of suit are assessed against them and the Martin Company.

ARGUMENT.

The cross-appeal attacks the decision of the Circuit Court of Appeals holding that each of these forty-four entrymen applied to enter the lands he or she obtained on speculation for the use and benefit of the Martin Company and not in good faith to appropriate it to his or her own exclusive benefit. The facts disclosed by the record (see testimony of Copeland, Rec., pp. 38–44) and found by the Circuit Court of Appeals in its opinion (Rec., p. 443) so clearly establish this fact that the Government is willing to forego any extended discussion of the question at this time. Escape from the conclusion reached by the Circuit Court of Appeals upon this point is impossible. A recital of these facts, however, is necessary to an intelligent discussion of the only real question in this case, which is the *bona fides* of the Detroit Company in its purchase of the

timber contracts and its subsequent purchase of the lands:

The Martin-Alexander Lumber Company maintained its sawmill in the vicinity of these lands. It was the only mill in that neighborhood. It naturally desired to purchase timber, and its only source of supply was the public lands in that vicinity. Knowing that the only manner in which the lands could be obtained by any one was through the Stone and Timber Act, Martin and Alexander arranged with Copeland, who seems to have been a confidential employee, to induce a number of persons, a large majority of whom were employees of the company, to make entries under the act. Copeland visited these persons, told them they could take up land under the act, that the company would pay 50 cents per thousand feet for the timber, that the value of the timber would be in excess of the price of the land, and that the company would advance them the money necessary to buy the land and to meet all expenses incident thereto. Copeland selected the land for each one, or at least assisted him in doing so. He also conducted the entrymen to the land office in squads, paying their traveling expenses. Two journeys were necessary—one to make their applications and one to pay for the land and obtain their final receipts. He paid not only the traveling expenses, but also the fees for the publication of the notices required by the statute and when the time came to pay for the lands the company lent to each of the entrymen the amount required,

whereupon the entryman obtained his final receipt Immediately thereafter each entryman made a promissory note in favor of the Martin Company for the amount advanced by the company with interest at 8 per cent per annum. A written agreement was then entered into between the Martin Company and the entryman by which the entryman sold and conveyed to the company all timber and trees upon his land and the right to enter and take them. The company agreed to pay the entryman 50 cents per thousand feet, the amount which it had advanced to be first deducted before any cash should be paid to the entryman, and 8 per cent interest in monthly installments as the timber should be cut and removed from the land. (For sample agreement, see Rec., p. 35.) Upon the execution of these agreements the promissory notes which had been given by the entrymen in the first instance were canceled and surrendered. This form of transaction took place between the company and all but three of the entrymen. These three refused to give notes or to make timber contracts with the Martin company, unless the company would consent to pay them something for the land in addition to the price of the timber. (Rec., pp. 254, 287.) Deeds from these three persons were afterwards obtained by a lawyer employed by the Detroit company for that purpose. (Rec., p. 44.) The forty-four entries were made at various times between August 21, 1899, and September 6, 1900. The land without the timber is of no value, and the only market for the timber in

that neighborhood was the Martin company. These are the facts, briefly stated, which left no doubt in the minds of the learned judges of the Circuit Court of Appeals that the lands were not entered for the exclusive use and benefit of the entrymen, but for the benefit of the Martin Company.

The case is the same in principle, indeed it is the same in fact, as that of the *United States* v. *Trinidad Coal and Coking Company.* (137 U. S., 160.) In that case certain stockholders and employees of the company made entries on coal lands in their individual names, the company paying the price of purchase and the expense incident to the acquisition of the lands by the entrymen. The company itself was disqualified, as was the case with the Martin Company. Patents were obtained by the entrymen whereupon they conveyed to the company. This court, speaking through Mr. Justice Harlan, at page 166, said:

> It is contended that the case made by the bill is not within the prohibitions of the statute, although the demurrer admits that the Trinidad Coal and Coking Company acquired the lands in dispute pursuant to a scheme whereby the several tracts were to be entered for its benefit, in the name of certain persons, its officers, stockholders, and employees, the title, when thus obtained, to be conveyed to the company, which should, and did, bear all the expenses attending the entries and purchases from the Government. This contention can not be sustained unless the court lends its aid to make successful a mere

> device to evade the statute. The policy adopted for disposing of the vacant coal lands of the United States should not be frustrated in this way. It was for Congress to prescribe the conditions under which individuals and associations of individuals might acquire these lands, and its intention should not be defeated by a narrow construction of the statute.

Whenever the Government attempts to have patents to its lands set aside by reason of fraud amounting to a violation of the terms of the Stone and Timber Act, the defendant immediately brings to the attention of the court the case of *United States* v. *Budd* (144 U. S., 154). In the Circuit Court of Appeals that case was urged with the same display of confidence that it is in all cases of this character. It is a significant fact, however, that the learned judges of the Circuit Court of Appeals totally ignored the Budd case and the arguments based upon it so far as the fraud of the entrymen in making their entries for the use of the Martin Company is concerned. Judge Sanborn, of the Circuit Court of Appeals, did mention the case in determining the question of *bona fide* purchase on the part of the Detroit Company, but that is all. The Circuit Court of Appeals wasted no time in discussing the facts as disclosed by the record upon the question of fraud. They appealed to that court with compelling force, and it will be observed that the conclusion upon that point was speedily reached. In the brief for the appellees in this court,

counsel, undaunted by the rebuke of the Circuit Court of Appeals, urge the Budd case upon this court. For the information of the court it may be said that in that case the bill charged that a single entry was made by Budd, who paid the purchase price and received the receiver's receipt, and thereafter a patent was issued to him by the Government; that prior to the issuance of the patent he sold and conveyed the land to one Montgomery upon a specific contract made between Budd and Montgomery before the entry was made. The case was based upon the restriction of the statute that the entryman shall not, directly or indirectly, make *any agreement or contract* by which the title he might acquire should inure in whole or in part to the benefit of any person except himself. The case was disposed of by this court upon the ground that the allegations of the bill were not amply sustained by the proof and upon the familiar principle of law that fraud must be clearly alleged and fully proved, and also upon the principle that it must be presumed that all steps essential to the taking out of a patent are regular unless the contrary clearly appears.

There is another striking difference between the case at bar and the Budd case. In the latter there was but one entry, but here there was a gigantic conspiracy upon the part of the officers of a lumber company to gather unto themselves an immense tract of land through a premeditated scheme.

The brief for appellees lays great stress upon the good faith and honesty of Alexander, Martin, and

Copeland and upon the fact that they testified that they studied the law with the idea of complying with it instead of violating it. The brief also deals at great length with the honesty, simple-heartedness, unsophisticatedness, illiteracy, and good nature of the entrymen. Without conceding that these entrymen possess these characteristics it is enough to say that they may possess them and may have had no intention of violating the law and yet have done so. It is for the courts to construe the Stone and Timber Act; not Martin, Alexander, Copeland, and their followers.

The conclusion of the Circuit Court of Appeals upon the question of fraud is based upon testimony given by the defendant entrymen themselves. The Government boldly called these defendants as witnesses and wrung from them the facts in the case. It had no other recourse. In the brief for the appellees will be found excerpts from the testimony of some of these defendants bearing favorably upon their case. Let us now take these same witnesses and see what they said in addition to that part of their testimony to which counsel called attention:

HENRY JONES testified:

That Mr. Copeland showed him the land he was to take up; that when his wife refused to make an entry Mr. Martin and Mr. Copeland expressed disappointment, and that Mr. Martin finally said "Never mind, that is all right, let somebody else take that" (Rec., pp. 89, 90); that Mr. Martin said to him, before he left to make the entry, "Understand, Jones, there is no

agreement between you and the company to buy that timber from you." This one bit of testimony on the part of Jones, who was the stenographer in the office of the Martin Company, reveals beyond the shadow of a doubt the whole scheme and purpose of this affair. What was the necessity for that remark? It was a warning to Jones that he should deny to everybody that there was any purpose upon the part of the Martin Company to buy his timber.

GEORGE T. COLSTON testified:

That Mr. Means, of the Martin Company, brought the matter of his making an entry to his attention; that he went out with Copeland to look at some property; that Means told him he could sell the timber after he had taken up the land for enough money to pay for the land and more; that Copeland gave him a paper containing a description of the land which he was to take up. (Rec., pp. 107, 109.) Asked on cross-examination whether he understood that he could not make any contract with reference to the sale of the land or the timber, he replied "He (Copeland) led me to believe that I could not make any *writing*." And "he led me to believe that unless there was an agreement and a contract drawn up that it was no contract." The learned trial judge saw the significance of this testimony, for at page 117 of the record he asked the witnesses how it happened that Jones told him that a contract that was not drawn up would not amount to an agreement.

Counsel for appellees, at page 27 of their brief, invite the court's attention to the testimony of Stephen

Fuller. We do the same. His testimony discloses the fact that he did everything that Copeland told him to do, signed every paper that was given him to sign, doesn't know whether the Martin Company owes him any money or whether he owes the Martin Company any money; doesn't know what became of his promissory note. He could not even say for certain whether a signature was his own. (Rec., p. 134 et seq.)

E. Y. FULLER testified:

That he heard from Copeland that land was to be taken up; that Copeland told him he could get him the money with which to do it; that Copeland gave him leave from his work with pay in order to take some parties to the Government lands.

CHARLES W. DAVIS testified:

That his attention was attracted to making an entry by Mr. Copeland; that he told Mr. Copeland that it was a new thing to him and that he did not understand it clearly; that Mr. Copeland asked him if his wife desired to make an entry also; that he told him he did not know; that Copeland was to take him out and show him a *certain* tract of land. (Rec., pp. 159, 160.)

R. C. GREGORY testified:

That he went into the transaction because he thought that he could make money out of it. (Rec., p. 181.)

MARY DAVIS testified:

That she doesn't know whether her indebtedness to the Martin Company has been paid off; that she only knows what Mr. Copeland told her; that Mr. Copeland

has not told her anything since she signed the contract. (Rec., pp. 191, 192.)

ARCHIBALD G. WINSLOW testified:

That he was an office employee of the Martin Company; that he went out with Mr. Copeland and three others to select land. We invite the court's particular attention to the following examination of this witness:

> Question. How did you go; in a livery-stable rig?
>
> Answer. In a livery-stable rig.
>
> Question. Who paid for that?
>
> Answer. I do not know who paid for it; it was my understanding that it was to be charged to my account.
>
> Question. Personal account?
>
> Answer. Timber account, I believe.
>
> Question. Did you carry a timber account there?
>
> Answer. No, sir; that point in my mind is not clear as to whether it was to be charged to my timber account or not.
>
> Question. Why did you say timber account?
>
> Answer. I do not know why I said that.

Here was a witness who unwittingly gave the whole scheme away by testifying that he had a timber account before he had taken the first step in the process of making his entry. (Rec., pp. 195, 196.)

WILLIAM F. WAITS testified:

That he took up the land for the purpose of making money.

SEBORN Z. MORAN testified:

That he made an entry; that after he did so he refused to sign a timber contract; and that upon doing so Mr. Alexander said "Out of forty-three you are the first that ever refused to sign the contract as soon as they got the receipt; the balance of them signed before they proved up their lands."

From these facts, disclosed by the defendants themselves, the court will see that all the comments of counsel as to the manner of men these witnesses were and what they said can not weigh against the above significant facts.

The question now to be determined is whether the Detroit Company is such a bona fide purchaser as is contemplated by the act of Congress which provides that if any person shall swear falsely in making his entry he shall forfeit the money which he may have paid for the lands, and all right and title to the same, and that any grant or conveyance which he may have made, except in the hands of bona fide purchasers, shall be null and void.

THE DETROIT COMPANY HAD ACTUAL NOTICE.

Continuing to state the facts bearing upon the transaction, which are undisputed, let us see what this record discloses:

The Martin Company was a close corporation. E. B. Martin, its president, owned 58½ per cent of the stock and, with the exception of one share, A. V. Alexander, its secretary, controlled all of the remainder which was owned by himself, his wife, and J. O. Means.

The office of the company was in Pike City, Ark. The Detroit Company had its office in St. Louis, Mo., and U. L. Clark was its president. Its capitalization, at the time the transaction between these two companies was proposed, was $40,000. About December 20, 1900, Alexander went to St. Louis and offered the property of the Martin Company to Clark. He requested Clark to purchase Martin's interest and to let him retain his interest. Clark refused this proposition, stating that the Detroit Company would not purchase a fractional interest of the Martin Company. It would take the entire property or nothing. Alexander then asked Clark to permit him to take stock in the Detroit Company for his interest in the Martin Company. Clark replied that the Detroit Company had no stock to sell, but that it might increase its stock, and if it did so Alexander's proposition might be accepted. The Detroit Company's inspector was sent to Arkansas to examine the lands upon which the Martin Company was supposed to own timber. This inspector made an examination as to the amount of timber on the lands. He made no investigation as to title. It was finally agreed that the entire property of the Martin Company should be turned over to the Detroit Company upon the basis of $60,000. Thirty-five thousand dollars was paid for the interest of Martin and J. O. Means. The remainder, or $25,000, was to be paid to Alexander for himself and wife. Cash was paid for the interest of Martin and Means and the payment of the sums due the Alexanders was deferred

until the Detroit Company could consider their application for stock. Later the capital stock of the Detroit Company was increased from $40,000 to $140,000 and stock to the amount of $25,000 was issued to the Alexanders. The Detroit Company took the entire property of the Martin Company and assumed all outstanding debts. On January 14, 1901, the Martin Company passed a resolution to sell to the Detroit Company, a formal deed transferring the property was made and dated March 1, 1901, and this deed was acknowledged May 2, 1901.

On January 14, 1901, the day upon which it was determined to make the sale, Alexander became general manager of the Detroit Company (Rec., p. 61). He was on the 1st day of April, 1901, elected secretary of the company (Rec., p. 62). The sign of the Detroit Company at Pike City bore his name and after it the word "Secretary" (Rec., p. 410). Clark became president of the Martin Company (Rec., p. 397) and the affairs of that company were wound up. It will be remembered that the deed of transfer was acknowledged and delivered on May 2, 1901, and it is the contention of the Government that the sale was not consummated until that day.

Now, it is an undisputed fact that Alexander and Martin, on account of the need of material by the Martin Company, arranged with Copeland to secure such material through the methods hereinbefore described, which methods have been condemned by the Circuit Court of Appeals and declared to be fraudulent.

Alexander occupied a dual position in the Detroit Company, general manager and secretary. The first-named office may not be an executive office, but that of secretary is such an office beyond any doubt, and knowledge on the part of an executive officer is notice to the company.

Thus the secretary of the Detroit Company permitted this deal to be consummated, and the deed acknowledged and delivered, with actual notice of the fraud, indeed with guilt upon his hands. It may be argued that Clark knew nothing of the fraud. Assuming, not conceding, this to be true, when the Detroit Company took Alexander into its service it became affected by the notice which Alexander himself had and it must stand the consequences. The Detroit Company will not contend before this court, under such a state of facts, that its hands are clean. It was contended below, and will doubtless be contended here, that this was a deal between two companies—that Clark represented one and Alexander the other. This is true, but the fact remains that it did not become a deal until *after* Alexander became an executive officer of the Detroit Company. If such a transaction is innocent and such a purchase is bona fide, as the Detroit Company contends, then it is difficult to see any room anywhere for such elements as guilt and *mala fides*. It hardly is possible that any court will permit a self-confessed conspirator, by joining in the ownership of the fruits of his conspiracy some one whom he claims to be innocent, to deprive the Government of a just recovery of its stolen property.

Again, there was a merger of these two companies and such merger did not have the effect of destroying disabilities which affected the property of the Martin Company. These disabilities followed in its wake. The Detroit Company was not a purchaser at all in the legal sense of the word. The two companies became one.

It matters not in what words the contract covering the transaction between the two companies was made if the effect of the transaction was to merge the two companies. His honor, Judge Sanborn, in passing upon this question of merger, stated that no merger was pleaded by the complainant. The bill charges The Detroit Timber and Lumber Company with notice of the fraud. If the facts in the case are sufficient to warrant the conclusion that a merger actually took place the company stands charged with notice of the fraud. Quoting from Clark and Marshall on "Private Corporations," section 348:

> Ordinarily the consolidating corporations are dissolved by the consolidation and cease to exist, and an entirely new and distinct corporation is created as of the time of the consolidation. It was formerly thought that this was always the effect of a consolidation, but it is now well settled that it is not necessarily so, and that a consolidation may be effected by the merger of one corporation in another, and continuance of the latter with the rights, franchises, privileges, and property of the former in addition to its own. (*Central Railroad and Banking*

Co. v. *Georgia*, 92 U. S., 665; *Meyer* v. *Johnston*, 64 Ala., 603.)

When the rights, franchises, and effects of two or more corporations are, by legal authority and agreement of the parties, combined and united into one whole and committed to a single corporation, the stockholders of which are composed of those (so far as they choose to become such) of the companies thus agreeing, this is, in law and according to common understanding, a consolidation of such companies, whether such single corporation, called the consolidated company, be a new one then created or one of the original companies continuing in existence with only larger rights, capacities, and property. (*Meyer* v. *Johnston*, *supra*.)

The mere purchase by one corporation of the property and franchises of another, either directly from the latter or at an execution or foreclosure sale, does not operate as a consolidation of the two corporations in the absence of express statutory provision to this effect. But it has been held that a consolidation, and not a mere purchase, by one corporation of the property and franchises of another is effected by a transfer of all the property, stock, and franchises of one corporation to another under an arrangement by which the stock of the latter is issued to the stockholders of the former in exchange for their stock. (*Chicago, Santa Fe, etc., Ry. Co.* v. *Ashling*, 160 Ill., 373.)

And section 354, at page 1064, says:

Sometimes a statute authorizing consolidation, while it does not provide for continuance

of the consolidating corporations for all purposes or indefinitely, expressly provides for their continuance for certain purposes, as for the purpose of adjusting their liabilities or transferring their property. (Citing numerous cases.)

Where corporations are merged into and constitute one, it is a consolidation. (*Philadelphia, etc., R. Co.* v. *Howard*, 13 How., 333.)

In *Chicago, etc., R. Co.* v. *Ashling* (*supra*), it was held that a transaction whereby one railroad company conveyed all its property to another, the latter stipulating to assume the indebtedness of the former and to issue its stock to the stockholders of such company in exchange for their stock *was a consolidation and not a purchase and sale.* A consolidation could be made by continuing in existence one of the original corporations. (See also *Hill* v. *Nisbet*, 100 Ind., 341.)

Morawetz on "Private Corporations," a high authority, volume 2, second edition, page 943, under the head "Consolidation," says that two corporations may be united by dissolving one of the companies, preserving the other company, and issuing shares in the second company to the shareholders of the first. At the bottom of page 943, he says:

> The consolidation of several corporations implies a transfer to the united company of the whole concern of each of the original companies. And, unless the contrary be expressly provided, it seems that the purpose and enterprise of the new company would be to carry on the business of both of the original companies.

Tested by these rules of law, how does the transaction between these two companies stand? The instrument by which the transfer took place will be found at page 423 of the record. Its essential provisions are that the Martin Company transfers and delivers to the Detroit Company its entire sawmill plant and everything connected with it, including book accounts and notes due it, as of January 1. It also transfers and assigns all timber contracts held by it for timber on lands in Pike County. It also grants all of its lands in Pike County. The Detroit Company assumed all debts of the Martin Company, and agreed that the property of the Martin Company "shall be received into the company of the party of the second part *as $60,000 of paid-up stock*, twenty-five thousand of which shall be issued to A. V. Alexander and B. M. Alexander, and they shall be entitled to all profits from it from January 15, 1901; the remainder shall be divided among the present stockholders as they may decide at the next meeting." It was further agreed that all of the stock held by the different parties in the Martin Company should be returned to the president of said company and placed in the stock book, duly canceled, *and the book turned over to the president of the Detroit Company.* It will be thus seen by this instrument that the Detroit Company really took over all of the stock of the Martin Company, called it in, and paid some of the holders in cash, and issued stock of the Detroit Company to others.

Counsel for the appellees, at page 84 of their brief,

call the court's attention to the maxim that equity always looks at the substance of things and not to the form—a very apt observation from the Government's view of this case. They further have the temerity to state that this transaction can not be regarded as a merger for the reason that they had not the legislative authority to bring about a merger. This proposition is met by two obvious answers:

First, the fundamental principle of law that no corporation can defend its acts or change their character in law by the claim that such acts are *ultra vires;*

Second, that legislative authority is not necessarily a condition precedent to a legal merger. Such a merger may always be ratified by the legislature after it has taken place. (*Bishop* v. *Brainerd*, 28 Conn., 289; *Mead* v. *New York, etc., R. Co.*, 45 Conn., 199.)

THE DETROIT COMPANY HAD CONSTRUCTIVE NOTICE.

Counsel for the Government urged upon the Circuit Court of Appeals the proposition that at the time the Detroit Company took over the timber contracts and lands, patents therefor had not been issued by the land department and that no one who takes before the issuance of such patent can claim a *bona fide* purchase, citing in support thereof the cases found in the court's opinion at page 450 of the record. The Circuit Court of Appeals held that these authorities failed to sustain the proposition; that they were cases in which the final receipts, which evidenced equitable title, were voided by the land department before the legal estate had been vested in the innocent purchasers,

and that they established the proposition that the legal title is indispensable to the defense of *bona fide* purchase. The Detroit Company having obtained the legal title to twenty-seven of these tracts of land before this suit was brought, it was held that it could not be charged with constructive notice, and that its title to the twenty-seven tracts of land and the timber on all forty-four tracts is indefeasible. We beg leave to suggest that the learned Court of Appeals here fell into a curious error as to the timber on the seventeen tracts of land. It held that if patents to land are attempted to be set aside on the ground of fraud the legal title is indispensable to the defense of *bona fide* purchase. The decree of the court voids the title to these seventeen tracts because the title is fraudulent and has not passed to a *bona fide* purchaser, and yet it holds the title of the Detroit Company to the timber good when that company took, in some cases, a mere equitable title to the timber before patent (taking only what equity its vendor had), and has not covered itself by the acquisition of the legal title. Even counsel for the appellants, in their brief at page 70, admit this. They say "the so-called timber contracts were in fact deeds for all the timber standing upon the land. They were absolute conveyances, and, as between the entrymen and Martin-Alexander Lumber Company, passed the title the entrymen had then or might thereafter acquire to the timber." Now, all the title the entrymen had was a defeasible equity, which title has been annihilated upon the ground of fraud. The Detroit

Company took only such title as the Martin Company had, because patents had not issued for all these seventeen tracts, and the Martin Company had only what title the entrymen had. The statute of Arkansas quoted by the counsel for appellees at page 72 of their brief has no application. Here no person attempted to "convey any real estate by deed purporting to convey the same in fee simple absolute." All that took place as to these seventeen tracts was a mere contract for the sale of the timber on the land. Moreover, this statute can not override the Stone and Timber Act as construed by the Federal courts. The case of *Hawley* v. *Diller* (178 U. S. 476), clearly shows the error in this decree. Granting for the purpose of argument that the Detroit Company's title to the twenty-seven tracts and the timber thereon is complete, can it be said that its purchase of the timber on these ~~seventeen~~ tracts before the issuance of the patent is bona fide? The fact that the patent was afterwards issued to the entrymen does not cure the defect, otherwise a patent could never be voided. We submit that whatever may be the decision of this court as to the title to the twenty-seven tracts, the timber on Some of these seventeen tracts, by force of the very decision attacked by the cross-appeal, belongs to the Government and that it should have an accounting from the two companies as to the amount of timber taken therefrom prior to the issuance of the injunction.

But the Government unhesitatingly contends that in any event where one takes a title to public land, or any

interest therein, before the issuance of patent, he stands charged with notice of any fraud in the acquisition of the land by the entryman. We contend that that is the logical inference to be drawn from the case of *Hawley* v. *Diller*, although in that case it was not necessary to analyze the question that far.

We now pass to a consideration of the question as to whether the Detroit Company had notice of any fact relating to this fraud sufficient to put it upon inquiry and whether it took such steps to assure itself of the title of its vendor as the law requires.

When it was agreed to merge the Martin Company with the Detroit Company on January 14, 1901, patents to thirteen of the tracts of land had been issued. The Martin Company had never taken deeds to the lands covered by these patents, nor did the Detroit Company take deeds to any of the lands until along in April. From that month on to September 10, 1901, it had succeeded in taking legal title to twenty-seven of the forty-four tracts. When asked why he took deeds from these entrymen when he already had contracts for the timber on the lands, Clark replied that he disliked the trouble of keeping timber accounts, and that this would be obviated by holding the fee simple title to the land. For deeds to these lands he paid to the entrymen as high as $75, 100 per cent higher than the estimated value of the timber in excess of the purchase price of the lands. These deeds were obtained only after much persuasion, and in three cases a lawyer was employed specially for that purpose.

When Clark negotiated with Alexander he made no investigation whatever as to the title of the land the timber on which was covered by the timber contracts. Nothing was said as to the title except the statements of Martin and Alexander that the title was "all right." (Rec., pp. 67.) On the examination he testified as follows:

> Question. Did you get any deeds at all from them in which any of the lands involved in this case were conveyed?
>
> Answer. Fee simple deeds?
>
> Question. Yes, sir.
>
> Answer. No, sir.
>
> Question. All that you got in regard to lands involved in this case were timber deeds or timber contracts?
>
> Answer. Yes, sir.
>
> Question. How many of these did you get?
>
> Answer. I think there were thirty-nine or forty, probably forty-one; I am not certain.
>
> Question. Did you get any receiver's receipts covering the same lands described in those timber contracts or deeds?
>
> Answer. No, sir.
>
> Question. You say no receiver's receipts at all?
>
> Answer. No, sir.
>
> Question. Did you ever have any of those receiver's receipts in your possession?
>
> Answer. No, sir.
>
> Question. They were never in your hands at all?
>
> Answer. No, sir.
>
> Question. Did you ever make any investigation of the title to the lands described in those

timber contracts before you completed your purchase?

Answer. Nothing, only Mr. Martin and Mr. Alexander told me that the title was all right. (Rec., pp. 66–67.)

Counsel for the appellees contend that Mr. Clark's duty stopped with the mere assurance from the vendor that the title was all right. Clark knew that the company had no record title to the lands described. He stated on the stand that the Martin Company had final receipts covering the timber tracts. Had he supposed the Martin Company held deeds to the land, he of course would have asked for them in place of the mere final receipts. He had no legal right to rely upon the bare statement of interested parties whose interest might prompt them to make false or misleading statements.

Price v. *MacDonald* (54 Am. Dec., 657).

Now, the dates of the timber contracts fall upon the heels of the date of the final receipts, and we contend that this, connected with the fact that there were book accounts with every one of these entrymen, except three, all of the same character and amounts, would have made any man who desired to know what he was buying stop and think. Clark either did not want to know the real facts in this case or else he was passive to a degree that makes him chargeable with notice of them. Here were forty-one timber contracts upon which, except thirteen, patents had not issued, all dated immediately after the issuance of final receipts, attempting to convey to a lumber company the timber on the

lands, with the books of the Martin Company showing that that company had advanced the money to pay for the land and all expenses incident thereto. How, then, could Clark have helped knowing that these lands were not entered in good faith to appropriate to the use of the entrymen? As is said by Pomeroy on Equity Jurisprudence, volume 2, section 762:

> A purchaser may part with a valuable consideration, may have no notice of any opposing claim, and yet lack the good faith which is essential to render his position a protection and his defense available. The party claiming to be a bona fide purchaser must come into a court of equity with absolutely clean hands.
>
> Passive good faith will not serve to excuse willful ignorance. (21 A. and E. Ency., p. 584, and authorities there cited.)

It is useless to rehearse the testimony of Clark as to what happened when this deal was made. The sum total of it is that the Martin Company presented a trial balance which Clark accepted and upon the basis of which he dealt with the Martin Company. He made no inquiry whatever. It merely happened that Martin and Alexander stated the titles to the lands upon which the timber was growing were good (Rec., p. 395). Instead of exercising the care that the ordinary prudent business man would have exercised, Clark studiously avoided making any inquiry. It was Clark's legal duty to look into the title of these entrymen, such as it was.

> A purchaser who is put upon inquiry does not discharge his duty by making inquiry of his

> vendor alone, but must exhaust all reasonable and available sources of information. (23 A. and E. Ency., p. 515.)

As a matter of fact, the Detroit Company knew that the moneys for these lands were advanced by the Martin Company. This is shown by the fact that there were personal accounts against three of the entrymen, Moran and wife and Dorsey. These three were the ones who refused to make timber contracts. The Detroit Company, through a lawyer named Brunson, effected a settlement of these accounts with these three persons by securing a conveyance of the identical tracts of land entered by them. Did the Detroit Company make this settlement in ignorance of what these personal accounts represented? The question answers itself.

We claim that the law as laid down in *Hawley* v. *Diller*, that one who takes title before the issuance of patent can not claim to be a bona fide purchaser, made it the duty of the Detroit Company to make the most searching inquiry at least as to all of the timber contracts except the thirteen for which patents to the land had issued.

The opinion of the Circuit Court of Appeals reads in part as follows:

> If the question had been put to the entrymen, to the entrywomen, to Martin, and to Alexander, they would have answered with a single voice that the statements in the applications were true, for they have so testified here.

We have already shown by the above citations that inquiry of the parties at interest is not sufficient. Could it be expected of them, when they were endeavoring to bring about a sale of their property, that they would condemn the title to it? We do not contend that inquiry should have been made of them.

The opinion then reads:

> If inquiry had been made of the officers of the land department, they would have replied that there was no falsehood in the statements and that the entries were lawfully and regularly made, for they issued the final receipts and the patents upon them in that belief.

Had Clark taken the timber contracts and the book accounts against these entrymen, showing that the whole proceeding of entry for each one had been conducted and paid for by the Martin Company, and exhibited them to the land officers, we think their answer would have been considerably different. Under the circumstances it was wise for him to keep away from the land officers.

In a case of this kind it is never possible to show fraud clearly and beyond any doubt. Fraud always attempts to cover itself, therefore the evidence which establishes it is always circumstantial. It must be remembered that these lumber companies depend upon the timber growing upon the public lands for their source of supply. Clark was a lumberman and he knew, as well as Martin and Alexander, that this timber came from Government land. He knew about the Stone and Timber Act and he knew that it was

unlawful for entries to be made in the interest of anyone except the entrymen. These facts alone were sufficient to put him upon inquiry. This whole transaction is urged upon the court as meeting the *bona fide* purchase defense and we submit with confidence that that was its whole purpose. It is true that Martin is apparently out of the lumber business in Arkansas, but Clark and the Alexanders are still there, engaged in lumbering and marketing Government timber from large tracts of land which it has obtained in plain violation of law and in shameful defeat of the intention of Congress.

We submit that the decree of the Circuit Court of Appeals as to this fact should be affirmed; that by reason of that conclusion it should be reversed as to the timber on the seventeen tracts and as to the title to the twenty-seven tracts of land; and that the Government should have an accounting of and payment for the timber cut on all forty-four tracts before this suit was commenced.

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